

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

INTRODUCTION

Plaintiff Roxanne K. Barry (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits under Title II of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Barbara A. McAuliffe.²

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew Saul as the defendant in this suit.

² The parties consented to have a United States Magistrate Judge conduct all proceedings in this case, including entry of final judgment, pursuant to 28 U.S.C. § 636(c). (Docs. 7, 9, 10.)

1 Having considered the briefing and record in this matter, the Court finds the decision of the
2 Administrative Law Judge (“ALJ”) to be supported by substantial evidence in the record as a whole
3 and based upon proper legal standards. Accordingly, this Court affirms the agency’s determination to
4 deny benefits.

5 **FACTS AND PRIOR PROCEEDINGS**

6 Plaintiff filed an application for supplemental security income on November 8, 2016. AR 182-
7 83, 184-85.³ Plaintiff alleged that she became disabled on June 3, 2016,⁴ due to fibromyalgia, chronic
8 pain, rheumatoid arthritis, depression, hyponatremia, osteoporosis, spondylolisthesis, and anxiety
9 disorder. AR 210-11. Plaintiff’s application was denied initially and on reconsideration. AR 89, 101,
10 102-05, 109-13. Subsequently, Plaintiff requested a hearing before an ALJ. ALJ William Kurlander
11 held a hearing on January 17, 2019, and issued an order denying benefits on March 21, 2019. AR 18-
12 32, 38-76. Plaintiff sought review of the ALJ’s decision, which the Appeals Council denied, making
13 the ALJ’s decision the Commissioner’s final decision. AR 7-11. This appeal followed.

14 **Relevant Hearing Testimony**

15 The ALJ held a video hearing on January 17, 2019, from Reno, Nevada. Plaintiff appeared in
16 Bakersfield, California with her attorney, Marcos Rodriguez. Impartial Vocational Expert (“VE”)
17 Thomas Mitchell, Ph.D., also appeared. AR 39-40.

18 In response to questions from the ALJ, Plaintiff testified that she last worked on June 3, 2016,
19 for Contra Costa Electric. She began there as a project administrator and then became the office
20 manager in 2004. As the officer manager, Plaintiff’s duties included reading contracts, notarizing
21 documents, helping put together bids and billing, and performing accounts payable. She stopped
22 working because of fibromyalgia issues. AR 46-47. She was exhausted; hurting all the time. She also
23 was dizzy, with blurred vision, and could not concentrate. AR 48.

24 Plaintiff testified that she attends Al-Anon meetings three times a week. She also attends book
25 study through Al-Anon. She has a driver’s licenses and drives two to three times a week. In the year
26

27 ³ References to the Administrative Record will be designated as “AR,” followed by the appropriate page
28 number.

⁴ Amended to April 10, 2017. AR 23.

1 prior to the hearing, she attended a group trip with Al-Anon to a beach. AR 53. Plaintiff testified that
2 she is getting counseling at Kaiser Permanente, and she finds it beneficial. AR 60-53.

3 Following Plaintiff's testimony, the ALJ elicited testimony from the VE, Dr. Mitchell. The VE
4 testified that Plaintiff's past work as office manager was performed at the sedentary level and is skilled
5 work, SVP-7. AR 68-70. The ALJ asked the VE hypothetical question. For the first hypothetical, the
6 ALJ asked the VE to assume an individual of Plaintiff's age, education, and past work. The ALJ also
7 asked the VE to assume an individual limited to work at the sedentary exertional level who could
8 occasionally use ramps and stairs and could have no more than occasional exposure to temperature
9 extremes, wetness, high humidity, and atmospheric irritants, such as dust, fumes, odors, and gases. This
10 individual could not push or pull with the bilateral lower extremities and needed a cane to ambulate.
11 The individual also could not work at exposed heights. There could be no more than occasional postural
12 activity, no climbing of ladders, ropes, and scaffolds, and no more than occasional work around moving
13 machinery. The individual also could be expected to be off task 5% of the time, because of pain and
14 fatigue. AR 69-70.

15 The VE testified that Plaintiff's past work as an office manager would be available both as
16 actually performed and normally performed. AR 70. The VE confirmed that his testimony regarding
17 the use of a cane to ambulate and time off task was consistent with the Dictionary of Occupational
18 Titles and consistent with his experience. AR 71. The answer would not change if the hypothetical
19 individual needed a front-wheel walker to ambulate. AR 74. The VE confirmed that this testimony
20 with respect to the four-wheel walker was based on his professional experience and training. AR 75.

21 Following the ALJ's questions, Plaintiff's counsel asked the VE to consider the first
22 hypothetical and add that the person would have unexcused absences two times per month. The VE
23 testified that this hypothetical person would be able to perform the work of an office manager. The
24 VE also clarified that two is the maximum that an employer would tolerate and, for anything above
25 that, the person would not continue in employment. AR 71-72.

26 **Medical Record**

27 The relevant medical record was reviewed by the Court and will be referenced below as
28 necessary to this Court's decision.

1 **The ALJ's Decision**

2 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
3 determined that Plaintiff was not disabled under the Social Security Act. AR 21-32. Specifically, the
4 ALJ found that Plaintiff had not engaged in any substantial gainful activity since April 10, 2017, her
5 amended alleged onset date. AR 23. The ALJ identified the following severe impairments:
6 rheumatoid arthritis, fibromyalgia, chronic pain syndrome, disorder of the back, and asthma. AR 23-
7 26. The ALJ determined that the severity of Plaintiff's impairments did not meet or equal any of the
8 listed impairments. AR 26.

9 Based on a review of the entire record, the ALJ determined that Plaintiff retained the residual
10 functional capacity ("RFC") to perform sedentary work except for the following limitations: could no
11 more than occasionally use ramps and stairs, but never climb ladders, ropes, or scaffolds; could no
12 more than occasionally perform postural activities; could have no more than occasional exposure to
13 temperature extremes, wetness, high humidity, and atmospheric irritants, such as dust, fumes, odors,
14 and gases; could not work at exposed heights; could not more than occasionally work around moving
15 machinery; needed a cane to ambulate; could not push and/or pull with the bilateral lower extremities;
16 and would be off task five percent of the time due to pain and fatigue. AR 26-31. With this RFC, the
17 ALJ found that Plaintiff could perform her past relevant work as an office manager. AR 31. The ALJ
18 therefore concluded that Plaintiff was not disabled under the Social Security Act. AR 31-32.

19 **SCOPE OF REVIEW**

20 Congress has provided a limited scope of judicial review of the Commissioner's decision to
21 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this
22 Court must determine whether the decision of the Commissioner is supported by substantial evidence.
23 42 U.S.C. § 405(g). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales*,
24 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,
25 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as
26 adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The record as a whole must be
27 considered, weighing both the evidence that supports and the evidence that detracts from the
28 Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the

1 evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*,
2 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner's
3 determination that the claimant is not disabled if the Commissioner applied the proper legal standards,
4 and if the Commissioner's findings are supported by substantial evidence. *See Sanchez v. Sec'y of
5 Health and Human Servs.*, 812 F.2d 509, 510 (9th Cir. 1987).

6 **REVIEW**

7 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
8 substantial gainful activity due to a medically determinable physical or mental impairment which has
9 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
10 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
11 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
12 her age, education, and work experience, engage in any other kind of substantial gainful work which
13 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The
14 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir.
15 1990).

16 **DISCUSSION⁵**

17 Plaintiff argues that the ALJ failed to include Plaintiff's mild mental limitations in concentration,
18 persistence, and pace and her mild limitation in interacting with others in the RFC assessment. Plaintiff
19 asserts that this was error because the mild limitations may eliminate her past skilled work.

20 At step two of the sequential evaluation, the ALJ found that Plaintiff's mental impairments of
21 depression, anxiety, posttraumatic stress disorder, and social anxiety disorder did not limit Plaintiff's
22 ability to perform basic mental work activities and were not severe. AR 24. In considering the four
23 broad areas of mental functioning, the ALJ determined that Plaintiff had only mild limitation in the
24 ability to interact with other individuals and mild limitation in the ability to concentrate, persist, and
25 maintain pace. AR 25.

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27 ⁵ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including arguments,
28 points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or brief is not to
be construed that the Court did not consider the argument or brief.

1 Plaintiff contends that the ALJ erred by failing to include these non-severe mental limitations
 2 in assessing her RFC and in the hypotheticals posed to the VE. Plaintiff submits that this alleged error
 3 is material because of the skilled nature of Plaintiff's past work. In support of his claim, Plaintiff
 4 relies upon *Hutton v. Astrue*, 491 Fed.App'x 850 (9th Cir. 2012). (Doc. 18 at 9.)

5 In *Hutton*, the ALJ determined at step two that the claimant's post-traumatic stress disorder
 6 ("PTSD") caused mild limitations in concentration, persistence, or pace, but was "nonsevere." *Hutton*,
 7 491 Fed.App'x at 850. The ALJ subsequently excluded consideration of the claimant's PTSD in
 8 reaching the RFC because he determined that the claimant lacked credibility. In finding this error, the
 9 Ninth Circuit explained,

10 Regardless of its severity, however, the ALJ was still required to consider Hutton's PTSD
 11 when he determined Hutton's RFC. *See* 20 C.F.R. § 404.1545(a)(2) ("We will consider all
 12 of your medically determinable impairments of which we are aware, including your
 13 medically determinable impairments that are not 'severe[.]'"). The ALJ, however, failed
 14 to do so. Instead, the ALJ discredited Hutton, his treating physicians' opinions, and the
 15 VA's disability rating. We do not base our action, however, on any of these determinations
 16 by the ALJ. Importantly, the ALJ then mischaracterized Mr. Hutton's testimony at least
 17 five times. Finally, the ALJ concluded that, based on Hutton's lack of credibility, his PTSD
 18 claims were in "great doubt." On that basis, the ALJ excluded Hutton's PTSD from
 19 consideration. This exclusion was legal error.

20 *Hutton*, 491 Fed.App'x at 850. The Ninth Circuit indicated that to properly determine the claimant's
 21 RFC, the ALJ "was required to consider [the claimant's] physical impairments and the 'mild'
 22 limitations his PTSD caused with concentration, persistence, or pace." *Id.* at 850-51.

23 Courts in this Circuit "have followed *Hutton* and found reversible error where the ALJ failed to
 24 include mild mental limitations in the assessment of the RFC." *See George A. v. Berryhill*, No. 5:18-
 25 CV-00405-AFM, 2019 WL 1875523, at *5 (C.D. Cal. Apr. 24, 2019) (collecting cases). However,
 26 other courts "have found *Hutton* to be inapplicable where the record demonstrates that the ALJ
 27 considered a claimant's non-severe mental impairments before concluding that they did not cause any
 28 significant limitation necessitating inclusion in the RFC." *Id.*; *see also Frary v. Comm'r of Soc. Sec.*,
 No. 1:20-cv-00260-SAB, 2021 WL 540 WL 5401495, at *10-16 (E.D. Cal. Nov. 18, 2021) (discussing
 cases wherein district courts found the ALJ erred based on *Hutton* and the line of cases that distinguish
Hutton and found no error); *Thompson v. Saul*, No. 1:18-cv-00137-BAM, 2019 WL 3302471, at *7

1 (E.D. Cal. Jul. 23, 2019) (“Courts in this Circuit ‘have followed *Hutton* and found reversible error
 2 where the ALJ failed to include mild mental limitations in the assessment of the RFC,’ while other
 3 courts ‘have found *Hutton* to be inapplicable where the record demonstrates that the ALJ considered a
 4 claimant’s non-severe mental impairments before concluding that they did not cause any significant
 5 limitation necessitating inclusion in the RFC.”), (quoting *George A.*, 2019 WL 1875523, at *5).

6 For example, courts in this district have found *Hutton* distinguishable where the ALJ found at
 7 step two that the claimant had nonsevere mental impairments and considered additional evidence
 8 related to the claimant’s mental impairments elsewhere in the decision. *See Sanguras v. Saul*, No.
 9 1:19-cv-1036 JLT, 2021 WL 973940, at *5 (E.D. Cal. Mar. 16, 2021); *Denney v. Saul*, No. 1:18-cv-
 10 00689-GSA, 2019 WL 4076717, at *7 (E.D. Cal. Aug. 28, 2019). In *Sanguras*, the claimant asserted
 11 the ALJ erred by not considering the presence of a non-severe mental impairment in evaluating her
 12 RFC. *Sanguras* 2021 WL 973940, at *5. The ALJ identified that the claimant had “‘mild limitations
 13 in concentrating, persistence, or maintaining pace’ and ‘mild limitations in adapting or managing
 14 oneself’” at step two. *Id.* However, the court determined that it was clear the ALJ considered
 15 evidence related to Plaintiff’s mental impairments after step two. *Id.* The court noted that the ALJ
 16 considered the claimant’s activities of daily living and evidence concerning her ability to complete
 17 tasks and follow instructions. The ALJ identified that Plaintiff was “able to prepare simple meals, do
 18 housework such as dishes, dusting, laundry and ironing, go outside, shop in stores and by computer,
 19 and socialize with others.” (*Id.*) The ALJ found some of the “mental abilities and social interactions
 20 required in order to perform these activities are the same as those necessary for obtaining and
 21 maintaining employment.” *Id.* Based on this, the court concluded that the record did not support the
 22 claimant’s assertion that the ALJ did not consider her nonsevere mental impairment in formulating the
 23 RFC. *Id.*

24 In *Denney*, the court noted the ALJ found at step two that any limitation resulting from
 25 Plaintiff’s mental impairments alone was at most mild. The ALJ gave little weight to the treatment
 26 records, finding that Plaintiff did not take prescribed anti-depressive medication. In addition, Plaintiff
 27 maintained activities of daily living that were inconsistent with a conclusion that her mental
 28 impairments severely impacted her functional abilities. *Denney*, 2019 WL 4076717, at *7. The court

1 concluded that the ALJ did not err in addressing the claimant's mental impairments in great detail at
2 step two and briefly at step four. *Id.*

3 Similarly, the ALJ here identified mild limitation in the ability to interact with other
4 individuals and mild limitation in the ability to concentrate, persist, and maintain pace at step two of
5 the sequential evaluation. AR 25. The ALJ gave little weight to the generalized statement from
6 claimant's treating provider that the claimant's mental health impaired her ability to function at home
7 and at work, finding that such opinions were "in direct conflict with the treatment notes [from] the
8 same day that noted the claimant's mental status was grossly normal and the mental status evaluation
9 of the claimant throughout the records." AR 25. The ALJ also found these opinions inconsistent with
10 the claimant's admitted activities of daily living, which included caring for herself and helping take
11 care of her grandson, managing her finances, shopping online, socializing with friends, attending
12 ALANON meetings, and driving. AR 26.

13 Further, in formulating the RFC, the ALJ indicated that he considered the functional
14 limitations resulting from all of Plaintiff's medically determinable impairments, including those that
15 were nonsevere, AR. 26. The ALJ also indicated that he considered "all symptoms" and their
16 consistency with the objective medical evidence and other evidence. AR 27. For example, the ALJ
17 noted that Plaintiff was able "to help care for her three dogs, vacuum, do laundry, load and unload the
18 dishwasher, [go out] alone, drive, shop online and in stores, manage her finances, sew, read, socialize
19 with friends over the phone and lunch outings, and *get along with authority figures.*" AR 27
20 (emphasis added), citing Ex. 4E and YF, p. 118). The ALJ also cited Plaintiff's testimony that "she
21 attended three ALANON meetings a week and had gone on an ALANON retreat to the beach." *Id.*
22 Further, the ALJ noted that regarding her mental health, Plaintiff testified she was attending
23 counseling and found it helpful. She also testified that she helped care for her seven-month-old
24 grandson. AR 27. The ALJ found that some of the "mental abilities and social interactions required in
25 order to perform these activities are the same as those necessary for obtaining and maintaining
26 employment." AR 27. As in *Sanguras* and *Denney*, it is evident that the ALJ considered evidence
27 related to Plaintiff's mental impairments after step two, including her activities of daily living and
28 evidence concerning her ability to get along with authority figures. In this case, unlike *Hutton*, the

1 ALJ expressly considered Plaintiff's mental impairment in formulating his residual functional
2 capacity. *See Frary*, 2021 WL 5401495, at *18 ("Unlike *Hutton*, the ALJ here did not expressly
3 decline to consider Plaintiff's mental impairments and the ALJ's own finding of a mild limitation
4 stemming from such.").

5 The omission of mental limitations from the RFC reflects the conclusion that the impairments
6 would not interfere with the ability to perform basic work activities. *See Sanguras*, 2021 WL 973940,
7 at *6. Only those limitations supported by substantial evidence must be included in hypothetical
8 questions posed to vocational experts. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 886 (9th Cir. 2006).
9 Based on the determination that Plaintiff's nonsevere mental impairments did not require limitations in
10 the RFC, the ALJ did not need to include any such limitations in the hypothetical questions posed to
11 the vocational expert. *Id.* at *6 ("Because the ALJ determined Plaintiff's nonsevere depression did
12 not require limitations in the RFC, the ALJ did not need to include mental limitations in the
13 hypothetical questions posed to the vocational expert to determine Plaintiff's ability to perform work
14 in the national economy.").

15 **CONCLUSION**

16 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial
17 evidence in the record as a whole and is based on proper legal standards. Accordingly, this Court
18 **DENIES** Plaintiff's appeal from the administrative decision of the Commissioner of Social Security.
19 The Clerk of this Court is **DIRECTED** to enter judgment in favor of Defendant Kilolo Kijakazi,
20 Acting Commissioner of Social Security, and against Plaintiff Roxanne K. Barry.

21
22 IT IS SO ORDERED.

23 Dated: March 16, 2022

24 /s/ *Barbara A. McAuliffe*
25 UNITED STATES MAGISTRATE JUDGE
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